82-428

No.

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

ELIZABETH CIAFFONI COWDEN, Trustee of the Estate of PAUL CIAFFONI,

Petitioner

v.

CONCETTA CIAFFONI, ROBERT J. CIAFFONI,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Pennsylvania Supreme Court violate the Due Process Clause of the Fourteenth Amendment when it ignored its own established adjudicatory procedures, and denied to the Petitioner access to Court prior to entering an Order which deprived Petitioner of her vested property rights?

2. Did the Pennsylvania Supreme Court violate the Due Process Clause of the Fourteenth Amendment by denying to Petitioner notice and an opportunity to be heard prior to entering an order which deprived Petitioner of her vested property rights?

3. Did the Pennsylvania Supreme Court contravene the Equal Protection Clause of the Fourteenth Amendment by treating Petitioner differently than it has treated similarly situated litigants, with no rational relationship to the advancement of any state interest?

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA

ELIZABETH CIAFFONI COWDEN, Trustee of the Estate of PAUL CIAFFONI, Proponent/Appellee.

CONCETTA CIAFFONI, ROBERT J. CIAFFONI, Contestants/Appellants.

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No.

IN THE

Supreme Court of the United States

October Term, 1982

IN RE: ESTATE OF PAUL CIAFFONI, Deceased
ELIZABETH CIAFFONI COWDEN, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner above-named respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this case on May 20, 1982.

OPINIONS BELOW

The *per curiam* opinion of the Supreme Court of Pennsylvania dated May 20, 1982, reversing its earlier final judgment entered April 30, 1980, and reversing the decree of the Orphan's Court Division of the Court of Common Pleas of Washington County, Pennsylvania, is reported as *In re Estate of Paul Ciaffoni, Deceased: Appeal of Robert J. Ciaffoni,* — Pa. —, 446 A. 2d 225 (1982). A copy of this *per curiam* judgment order and opinion is printed in the Appendix at A1.

The *per curiam* opinion and judgment of the Supreme Court of Pennsylvania dated April 30, 1980 is reported as *In re Estate of Paul Ciaffoni, Deceased,* 491 Pa. 46 (1980). A copy of this opinion and judgment is printed in the Appendix at A4.

The Order of the Supreme Court of Pennsylvania dated June 16, 1980, denying reargument from the entry of judgment on April 30, 1980 is not reported. A copy of this Order is printed in the Appendix at A10.

The opinion of the Orphan's Court Division of the Court of Common Pleas of Washington County, Pennsylvania, dated August 27, 1979, which was upheld on April 30, 1980, but reversed by the appellate court on May 20, 1982, is not reported. A copy of this opinion is printed in the Appendix at A11.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania, reprinted in the Appendix, at A26, was entered on May 20, 1982. A timely petition for reargument was denied *per curiam* by the Supreme Court of Pennsylvania on June 10, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2542

An application for reargument shall be filed with the prothonotary within 14 days after the entry of the judgment or other order involved.

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2545

No answer in opposition or separate motion to strike an application for reargument will be received unless requested by order of the court. No application for reargument will be granted in the absence of such a request and an opportunity to submit an answer in response thereto.

. . .

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2547

Second or subsequent applications for reargument, and applications for reargument which are out of time under these rules, will not be received.

STATEMENT OF THE CASE

On April 30, 1980, the Supreme Court of Pennsylvania entered a final judgment in this case. On May 20, 1982, the Supreme Court of Pennsylvania took the unprecedented step of reversing that final judgment on the identical issue which it had conclusively determined two years before. The manner in which the Supreme Court of Pennsylvania reversed itself in this case deprived Petitioner of her property without affording to Petitioner procedural due process; and violated Petitioner's equal protection rights. First, the Supreme Court of Pennsylvania arbitrarily ignored its own established rules, which unequivocally provide for notice and an opportunity to be heard on issues to be determined, and decided an issue which was not before it on appeal, and which had not been briefed or argued. Second, the Supreme Court of Pennsylvania deprived the Petitioner of established procedural rights, which procedural rights had been accorded every other litigant who had ever appeared before that Court. The Pennsylvania Supreme Court's clear indifference to Petitioner's constitutional right to due process and equal protection of the law mandate acceptance of this case for review.

The underlying case, which prompted the Supreme Court of Pennsylvania's inexplicable and unconstitutional reversal of its earlier final judgment, concerns a challenge to the validity of the May 10, 1968 Last Will and Testament ("Will") of Paul Ciaffoni, who died on September 23, 1974, residing in Washington County, Pennsylvania. The decedent's Will was admitted to probate by the Washington County Register of Wills on December 16, 1974.[1] On December 11, 1975, Margaret Soviero, one of

1. The Will was originally admitted to probate on November 25, 1974, but the Register of Wills of Washington County, Pennsylvania never entered this on the docket. The Will was again ad-

Paul Ciaffoni's daughters, filed an Appeal from Probate questioning the authenticity of the Will. One year later, on December 9, 1976, Concetta Ciaffoni (the widow) and Robert J. Ciaffoni (decedent's son) filed their separate Appeals from Probate contesting the authenticity of the Will. These three Appeals from Probate were consolidated by Order dated January 31, 1977. On August 1, 1978, an Amended Appeal from Probate was filed by Concetta and Robert J. Ciaffoni. These three Appeals from Probate alleged that the Will was a forgery in that pages had been substituted after the Will had been signed. The authenticity of the signature of the decedent, which appeared on the last page of the Will, was never questioned at any time.

On September 18, 1978, almost three (3) years after the first Appeal from Probate had been filed, an advisory jury was empanelled and trial commenced.[2] The Honorable Earl S. Keim was specially appointed to preside at that trial. During that trial, Richard DiSalle, Esquire ("DiSalle"), the scrivener of the Will, identified each page of the Will as having been prepared by him and produced the original carbon copies of the Will which he had retained in his office. Frances Gray ("Gray"), DiSalle's secretary (and one of the subscribing witnesses to

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1. (Cont'd.)
mitted to probate on December 16, 1974, after a hearing was held to qualify Robert Ciaffoni as an Executor. For the purposes of this Petition, the latter date is accepted as the date of admission to probate.

2. Under Pennsylvania Rules of Orphan's Court Procedure in effect at the time when this case was called for trial, an advisory jury could have been empanelled to make findings of fact. The empanelling of such a jury was discretionary on the part of the trial judge.

the Will), testified that she had typed each page of the Will.

In addition to identifying each page of the Will, DiSalle also testified that the Will in probate was a revision of a prior Will of the decedent, which DiSalle had also drafted and the decedent had signed on November 29, 1967. That 1967 Will, in turn, had been based on a 1965 Will prepared by another lawyer named Patrick Derrico, Esquire ("Derrico"). DiSalle's testimony clearly established that the May 10, 1968 Will was not DiSalle's own work product –rather, he had relied in large measure on the work product of another lawyer.

In their attempt to refute the authenticity of the May 10, 1968 Will, the contestants offered to introduce, *inter alia,* three items of evidence. First, they offered the testimony of an alleged expert in linguistic styles who would have testified (1) that he had compared the decedent's Will to approximately fifty (50) other wills believed to have been written by DiSalle; and, (2) that, based on this comparison, he found linguistic and stylistic differences. This "comparison" led the contestants' expert to believe that the contested Will had been written by someone other than DiSalle. The proffered testimony was refused by the trial court because: (1) the contestants had not established that such linguistic analysis techniques had any validity, whatever; and, (2) DiSalle himself admitted having used a prior Will written by a different lawyer in preparing the May 10, 1968 Will. Quite simply, the proposed "expert" testimony would have merely corroborated DiSalle's testimony—not refuted it—and would not have been probative of any fact at issue.

The second item of evidence offered by the contestants, and rejected by the trial court, was the testimony of an alleged expert in typing characteristics. He claimed

to have compared thirty-nine "typing elements" [3] in the decedent's Will with those elements in approximately fifty other "comparison" wills supposedly written by DiSalle and typed by Gray. This proffered testimony was refused because (1) the contestants could not establish that Gray had typed all of the "comparison" wills; (2) both DiSalle and Gray testified that there was no standardized format which they used in preparing and typing wills; (3) the contestants could not establish that there was any scientific support for the comparison technique in general, or for the thirty-nine "typing elements" selected by the proposed witness as his standards for comparison; and, (4) the "comparison" wills were, at most, three pages long, while the May 10, 1968 Will was seven pages long. The contestants had again failed to lay a proper factual or scientific foundation to permit the comparison which they sought.

The third item of evidence proffered by the contestants, and also refused by the trial court, was the result of a test performed on the contested Will by the inventor of an "electrostatic detection apparatus" ("ESDA"). This machine was alleged to be capable of measuring and revealing very slight indentations in paper surfaces, such as those which occur on sheets of paper placed beneath a sheet on which writing is being done. The results of this testing purportedly showed that the indentations on the backer to the decedent's Will did not correspond precisely to the handwritten date and the signatures of the decedent and the witnesses on the last page of the will.

3. "Typing elements" are items which allegedly characterize the style of a particular typist. They include, for example, width of margins, spacing and paragraphing, the presence or absence of underscoring where blank spaces (such as date) are to be filled in, and the presence or absence of a typed name below a signature line.

However, Ordway Hilton and Paul Osborne,[4] two recognized document experts, testified, *in camera*, that they could only speculate as to why there was a misalignment. The Trial Judge properly ruled this highly speculative testimony inadmissible; and further ruled that, in any event, the ESDA had never achieved scientific acceptance in the United States.

After the contestants' proffered evidence was declared inadmissible, the contestants chose to put on no evidence. Judge Keim thereupon withdrew the case from the advisory jury and entered an Order upholding the validity of the May 10, 1968 Will. The contestants then filed Exceptions to Judge Keim's Order.

On August 27, 1979, Judge Keim entered an Order denying contestants' Exceptions, and the contestants appealed to the Pennsylvania Supreme Court.[5] The sole issue before the Supreme Court on this appeal was the correctness of the various evidentiary rulings described above. On April 30, 1980, the Supreme Court of Pennsylvania affirmed the trial court *per curiam*, with one Justice dissenting and one Justice not participating. A subsequent application for reargument in the Pennsylvania Supreme Court was denied on June 16, 1980. This Court subsequently denied the contestants' Petition for A Writ of Certiorari which was docketed on or about November 13, 1980, as *Concetta Ciaffoni, et al., Peti-*

4. Ordway Hilton was appointed by Judge Keim to act as an independent expert. Paul Osborne was the contestants' document expert. Judge Keim permitted both Hilton and Osborne to testify, *in camera*, before ruling on the admissibility of their testimony.

5. Under Pennsylvania procedure, the contestants were required to file Exceptions before perfecting an appeal to the Supreme Court. The Opinion of Judge Keim (A11) was written after briefs were filed and oral argument was held on those Exceptions.

tioners v. Elizabeth Cowden, et al., Respondents, No. 80-775.

When this Court denied the contestants' Petition for A Writ of Certiorari, and refused to review the April [illegible], 1980 judgment entered by the Pennsylvania Supreme Court, five years of litigation ended with the determination that the May 10, 1968 Will was not a forgery. The merits concerning the refusal by the Trial Judge to permit the evidence proffered by the contestants had been finally adjudicated in favor of the instant Petitioner. This Petitioner, having obtained that final judgment which vested in her, and the other beneficiaries under the Will, the property interests devised by the Will, continued to administer her late father's estate, e.g. selling and leasing various properties.

On July 25, 1980, four months before filing their Petition for A Writ of Certiorari with this Court, the contestants filed, with the Trial Court, a Motion for New Trial, *Nunc Pro Tunc.* This Motion was denied on October 2, 1980. Exceptions were filed, and the Exceptions were denied on December 16, 1980. On May 8, 1981, the contestants filed a second Motion for New Trial, *Nunc Pro Tunc,* which was denied on May 18, 1981. Exceptions were filed, and on July 2, 1981, these Exceptions were denied.

In both of those new trial motions, the contestants argued that they were entitled to a new trial because they purportedly had found "newly discovered evidence". This "newly discovered evidence" merely consisted of additional publicly filed wills and deeds, allegedly drafted by DiSalle, and which had been available at the time of the original trial.

The contestants' appealed from the trial court's denials of the two Motions for New Trial, *Nunc Pro Tunc.*

The two appeals were consolidated and heard by the Pennsylvania Supreme Court, from which proceeding springs the instant Petition. The *only issue* which was appealed to the Pennsylvania Supreme Court on these consolidated appeals was the issue raised in the new trial motions: whether publicly filed documents, available at the time of the original state court trial, constituted "newly discovered evidence" sufficient to grant a new trial. Briefs on this sole issue were duly filed, and the Supreme Court heard oral argument on this sole issue on January 18, 1982. At no time was any brief submitted, or argument made, concerning the merits of the evidentiary rulings made during the 1978 trial, which had been the subject of the Pennsylvania Supreme Court's April 30, 1980 judgment in affirmance.

On May 20, 1982, over two (2) years after its original judgment had been announced affirming the evidentiary rulings made by the Trial Judge, the Pennsylvania Supreme Court, with one Justice not participating, reversed its own prior final judgment, conspicuously avoiding any discussion of the "newly discovered evidence" issue raised by the contestants in their appeals. In reaching into the past and treating these new appeals as a second application for reargument, the Pennsylvania Supreme Court ignored its own rules which (1) set a fourteen (14) day limitation on applications for reargument,[6] (2) prohibit second and late filed applications for reargument,[7] and (3) require that, before any application for reargument is granted, the opposing side be given notice and an opportunity to oppose the grant of reargument.[8] The Pennsylvania Supreme Court did not give notice to the Petitioner

6. Pennsylvania Rule of Appellate Procedure 2542, p. 3, *supra*.

7. Pennsylvania Rule of Appellate Procedure 2547, p. 3, *supra*.

8. Pennsylvania Rule of Appellate Procedure 2545, p. 3, *supra*.

that the appeals would be treated as a second application for reargument, or give Petitioner an opportunity to submit any brief in connection with the merits of the original evidentiary issue on which it was about to render a new and contrary decision. Rather, the Pennsylvania Supreme Court, *sua sponte* granted the "second application for reargument" in direct contravention to its own rules, reversed its prior decision denying reargument, reversed on the merits its April 30, 1980 judgment, totally ignored the sole issue which was before the Court on appeal, and remanded the matter to the trial court.

Between April 30, 1980, when the Pennsylvania Supreme Court entered its first judgment on the merits of the trial court's evidentiary rulings, and May 20, 1982, when the Pennsylvania Supreme Court reversed that two-year-old final judgment, the composition of the Court had changed; two Justices who had been sitting in 1980 were no longer members of the Court in 1982. As a result, two Justices who had never had the case presented to them on the merits, and who had neither the opportunity to review the case on the merits or to read the briefs or hear argument on the merits, took part in ruling on the merits and entering an order in direct contravention of the earlier final judgment of the Pennsylvania Supreme Court.

On June 1, 1982, Petitioner herein timely filed an application for reargument with the Supreme Court of Pennsylvania. In that application for reargument, Petitioner raised, *inter alia*, the precise federal constitutional questions now presented to this Honorable Court. These constitutional claims were thus raised at the first stage in the proceedings when they became material and relevant to the disposition of this case. By *per curiam* order dated June 10, 1982, the Supreme Court of Pennsylvania summarily denied Petitioner's application for reargument.

Petitioner's Application to Stay Remand of Record Pending Review in this Court was granted following a hearing before Mr. Justice Nix of the Pennsylvania Supreme Court. A27. During the hearing on the stay application, Mr. Justice Nix stated that the Pennsylvania Supreme Court took a two-step approach in deciding this case. First, the Court decided whether to treat the contestants' consolidated appeals as a request to ignore, in this one case, its rules of procedure and allow a second application for reargument. Then, having decided to allow a second application for reargument, the Court decided to address the merits raised in the *first* appeal. Petitioner was given no notice by the Pennsylvania Supreme Court that it would ignore its own procedural rules—and was thereby precluded from presenting any argument that the Court not adopt this novel approach. Moreover, Petitioner was given no notice that the original judgment was coming under the Court's scrutiny—and Petitioner was thereby precluded from briefing and arguing the substantive evidentiary issue which was decided.

The effects of the actions taken by the Pennsylvania Supreme Court were to deprive Petitioner of the final judgment entered on April 30, 1980, and vested property rights which Petitioner had obtained based on that judgment, without notifying Petitioner that that judgment and the property rights were even in jeopardy; and, without providing to Petitioner any opportunity whatever to argue in support of the judgment and her property rights.

The instant Petition to this Court followed the Pennsylvania Supreme Court's denial of Petitioner's timely application for reargument.

REASONS FOR GRANTING THE WRIT

Of central concern in analyzing a claimed due process violation is whether the aggrieved party was afforded the legal process which was due. Conceptually the due process clause

> . . . expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services of Durham County, North Carolina, — U. S. —, —, 101 S. Ct. 2153, 2158 (1981). While the parameters of due process are incapable of bright-line definitional distinctions, the lynchpin for constitutional sufficiency is whether the notice given to a litigant, prior to any ultimate decision affecting that litigant's rights, is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . ." *Texaco, Inc. v. Short*, — U. S. —, —, 102 S. Ct. 781, 794 (1982) *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). Moreover, the Due Process Clause of the Fourteenth Amendment

> . . . imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.

Lassiter v. Department of Social Services of Durham County, North Carolina, — U. S. —, —, 101 S. Ct. 2153, 2163 (1981).

Finally, an elemental and "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Parratt v. Taylor*, — U. S. —, —, 101 S. Ct. 1908, 1915 (1981) quoting with approval from *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965).

Petitioner argues that she has not received the minimal procedural due process prescribed by this Honorable Court. The only issue properly before the Pennsylvania Supreme Court was that raised in contestants' consolidated appeals from the denials of the two Motions For New Trial, *Nunc Pro Tunc*. The only issue which was submitted, briefed and argued was whether the contestants' "newly discovered" evidence was sufficient to warrant a new trial. The fact that the Pennsylvania Supreme Court totally ignored this issue in its May 20, 1982, *per curiam* opinion bespeaks the speciousness of contestants' position. The only conclusion to be drawn is that no ground for a new trial existed.

Rather, the Pennsylvania Supreme Court chose to disturb its prior final judgment, over which it had no jurisdiction, vacate that judgment, and strip Petitioner of her vested property rights. In so doing, the Court neither notified Petitioner, nor gave to Petitioner an opportunity to be heard; and, contravened at least three established rules of Pennsylvania appellate procedure.

Pennsylvania Rule of Appellate Procedure 2542 provides that an application for reargument from the entry of judgment "shall be filed . . . within 14 days after the entry of judgment . . .". Pennsylvania Rule of Appellate Procedure 2547 provides that untimely and "[s]econd or

subsequent applications for reargument . . . will not be heard." Clearly, the consolidated appeals before the Supreme Court of Pennsylvania from the denials of contestants' new trial motions were not filed within 14 days and under the Court's own rules, which were clearly ignored, should not have been heard.

Moreover, the Pennsylvania Supreme Court ignored Pennsylvania Rule of Appellate Procedure 2545 which states:

> . . . No application for reargument will be granted in the absence of such a request and an opportunity to submit an answer in response thereto.

In short, the Pennsylvania Supreme Court not only granted reargument without notice to Petitioner and without affording Petitioner "an opportunity to submit an answer in response", it decided the merits of the questions to be reargued without holding reargument. Petitioner had no process prior to losing her vested property rights.

This Court is respectfully urged to grant the instant Writ in order to ensure that the Pennsylvania judicial system will not act to deny persons the opportunity to be heard before depriving them of their property rights; and, to ensure that all judicial proceedings be conducted in a manner consistent with basic fundamental fairness mandated by the Fourteenth Amendment.[9]

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9. As a consequence of the Pennsylvania Supreme Court's unprecedented action in this case, there are further proceedings to be conducted in this case in the Pennsylvania courts. Nonetheless, this fact does not preclude this Court from exercising its certiorari jurisdiction under 28 U. S. C. § 1257(3). This Court has created four exceptions to the "final judgment or decree" limitation with respect to appeals from state litigation. The circumstances of this case fall within the ambit of two of those judicially created excep-

When a State Court Ignores Its Own Established Adjudicatory Procedures, and Thereby Denies a Litigant Access to Court While Nonetheless Depriving the Litigant of Property, the State Action Requirement of the Fourteenth Amendment Has Been Met. There Is a Cognizable and Enforceable Due Process Claim of Entitlement

For petitioner to establish her Fourteenth Amendment due process claim, she must establish (1) that she was deprived of property, (2) that the deprivation resulted from an act of the State, i.e. the Commonwealth of Pennsylvania, and (3) that the State acted without affording her due process of law. This tripartite test has been met in this case.

The property at issue is the judgment obtained by Petitioner on April 30, 1980, and Petitioner's legitimate and vested claim of entitlement in the Estate of Paul Ciaffoni, the deceased. Petitioner, and those legatees whom she represents as Executrix, obtained a vested, immutable property interest in the Estate of Paul Ciaffoni in 1980 when the Pennsylvania Supreme Court finally determined the validity of Paul Ciaffoni's will.

As this Court stated in *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 576-577 (1972):

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9. (Cont'd.)

tions. First, if this Court finds that petitioner's federal constitutional rights were abridged, such a determination would render the pending state proceedings not only unnecessary but unlawful. Second, if this Court declines to exercise its certiorari jurisdiction, petitioner will be unable to litigate the present constitutional claims as they will not survive the proceedings in the lower Pennsylvania courts. Thus, for practical purposes of adjudication, the Pennsylvania Supreme Court's summary disposition of these federal claims is final. See *Cox Broadcasting Corporation v. Cohn*, 420 U. S. 469, 479-482 (1975).

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.
>
> . . .
>
> To have a property interest . . . a person . . . clearly must have more than an abstract need or desire . . . , more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect these claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Here, after the Supreme Court of Pennsylvania entered its April 30, 1980 judgment and finally upheld the Will, Petitioner, relying on that judgment and the property rights which vested as a result of that judgment, began to administer the estate, selling and leasing properties and acting in accordance with her authority as Executrix. Moreover, the legatees and trust beneficiaries under the May 10, 1968 Will obtained a vested interest in the Estate being administered. Indeed, the judgment itself was a vested property right. In relying on the Supreme Court of Pennsylvania's April 30, 1980 judgment upholding the May 10, 1968 Will, Petitioner reasonably believed that such reliance and authority could "not be arbitrarily undermined." However, the Pennsylvania Supreme Court's unprecedented action two years later brought about just such a result.

With respect to the second level of inquiry, the requisite state action, petitioner has established that the deprivation of property resulted from an act of the State. The Pennsylvania Supreme Court, and the individual Justices of that Court, are agents of the Commonwealth of Pennsylvania. Their powers and judicial authority derive from and were created by state law.[10] Judges are state officials and their actions are therefore actions attributable to the State. *See, Dennis v. Sparks*, — U. S. —, 101 S. Ct. 183 (1980); *Supreme Court of Virginia v. Consumers Union of the United States*, — U. S. —, 100 S. Ct. 1967 (1980); *Stump v. Sparkman*, 435 U. S. 349 (1978).[11] Thus, the property deprivation here alleged clearly resulted from state action.

Finally, Petitioner was deprived of her vested property rights without due process. Rule 2545 of the Pennsylvania Rules of Appellate Procedure mandates that appellate courts in the Commonwealth of Pennsylvania provide notice and an opportunity to be heard to litigants whose opponents have timely sought reargument or rehearing on a case previously decided. Under that Rule, Pennsylvania appellate courts are barred from *sua sponte* granting either reargument or the ultimate relief sought, absent affording the opposing litigant meaningful notice and a meaningful opportunity to be heard. Thus, the

10. Pennsylvania Constitution Article 5 §§ 1-2, 10 (adopted April 23, 1968).

11. Although these cases arose under 42 U. S. C. § 1983, this Court made clear during its last Term

> . . . that in a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical.

Lugar v. Edmondson Oil Co. Inc., — U. S. —, —, 102 S. Ct. 2744, 2750 (1982).

State has guaranteed access to the courts by a procedure complying fully with the mandates of due process. Once the state accords access to its courts, and thereby preconditions its own authority to act, the State may not arbitrarily deny access to these "established adjudicatory procedures." As this Court stated in *Logan v. Zimmerman Brush Company*, — U. S. —, —, 102 S. Ct. 1148, 1154 (1982):

> [T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right(s)." *Boddie v. Connecticut*, 401 U. S. 371, 300, 91 S. Ct. 780, 787, 28 L. Ed. 2d 113 (1971).

By violating its own "established adjudicatory procedures" and failing to afford access to the court, the Pennsylvania Supreme Court denied Petitioner her due process rights to notice and an opportunity to be heard.

A State's Highest Court Violates the Most Basic Tenets of Due Process and Fundamental Fairness When, Without Reason or Necessity, It Ignores Its Promulgated Rules and Deprives a Litigant of Property Rights Without Notice That Such Adjudication Is Being Considered, and Without an Opportunity to Be Heard

In rendering its decision in this matter, the Supreme Court of Pennsylvania arbitrarily ignored precise procedural rules which it had promulgated, totally ignored the only issue before it on appeal, and disposed of this case on an issue not submitted to it for consideration.

Indeed, the identical legal issue "decided" by the Supreme Court of Pennsylvania on May 20, 1982, had been finally decided by that same court two years earlier. By reaching for a legally unreachable issue, without notice to Petitioner and without providing to Petitioner an opportunity to be heard, the Supreme Court of Pennsylvania deprived Petitioner of the most basic tenets of due process and fundamental fairness: meaningful notice and a meaningful opportunity to be heard. By its unprecedented aversion to the constitutional process due Petitioner, the Supreme Court of Pennsylvania denied petitioner of property in direct contravention of the Fourteenth Amendment to the United States Constitution. The only remedy Petitioner has rests with this Court as the ultimate bulwark against encroachment by the States of federally secured rights.

The constitutional issue in this case is the obverse of that presented in the series of cases where the State, under the guise of an established but defective state procedural rule or statute, deprives a litigant of property rights. *See, e.g., Fuentes v. Shevin*, 407 U. S. 67 (1972); *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U. S. 337 (1969).[12] As held by this Court in those cases, Fourteenth Amendment due process mandates that notice and a hearing occur prior to deprivation.

Here, the applicable state procedural rule not only contemplates that all state litigants will receive their full panoply of procedural due process rights, but, in fact, these very rules guarantee procedural due process. Specifically, Rule 2545 of the Pennsylvania Rules of Appellate Procedure provides that a Pennsylvania appellate court

12. *See also, Lugar v. Edmondson Oil Co.*, — U. S. —, 102 S. Ct. 2744 (1982); *Greene v. Lindsey*, — U. S. —, 102 S. Ct. 1874 (1982); *Logan v. Zimmerman Brush Company*, — U. S. —, 102 S. Ct. 1148 (1982).

may neither (1) grant reargument *sua sponte* nor (2) grant the relief requested in an application for reargument, unless the opposing party has been provided an opportunity to be heard thereon.[13] Despite the unequivocal language of its own rule, the Pennsylvania Supreme Court nonetheless granted reargument in this case and then *sua sponte* granted the relief sought, and reversed its prior final judgment without ever affording Petitioner any prior notice or an opportunity to be heard.

The insidious manner in which the Pennsylvania Supreme Court chose to ignore its own established procedures had the identical effect which was declared unconstitutional in *Fuentes v. Shevin, supra, Goldberg v. Kelly, supra,* and *Sniadach v. Family Finance Corporation, supra.* The litigants in those cases successfully attacked a state procedural rule or statute as unconstitutional because the rule or statute did not provide for notice and an opportunity to be heard prior to a determination depriving those litigants of a property right.

Moreover, in order to circumvent the clear admonition of Rule 2547 of the Pennsylvania Rules of Appellate Procedure, which absolutely forbids parties from filing "second or subsequent applications for reargument," [14] the Pennsylvania Supreme Court *sua sponte* chose to treat the contestants' direct, consolidated appeals from the denial of their new trial motions, as an application for modification of its procedural rules.[15] In so doing the Pennsyl-

13. For the pertinent text of Pa. R. A. P. 2545, see p. 3, *supra.* This rule became effective on September 30, 1979, following its promulgation by the Pennsylvania Supreme Court, and was "[p]atterned after U. S. Supreme Court Rule 58(3)." Pa. R. A. P. 2545 (Note).

14. For the full text of Pa. R. A. P. 2547, see p. 3, *supra.*

15. Prior to its decision in this case, the Supreme Court of Pennsylvania had never granted a second application for reargu-

vania Supreme Court acted in derogation of its judicial responsibility and deprived Petitioner of property without due process of law.

By this petition, Petitioner seeks only the notice and opportunity to be heard which are guaranteed by the Fourteenth Amendment and which, until the action complained of here, were guaranteed by established state procedure. Petitioner asks this Court to require the State to provide the due process which has thus been denied. The manner in which the Pennsylvania Supreme Court deprived Petitioner of due process, and took from Petitioner her property, i.e., the April 30, 1980 judgment and vested property rights in the decedent's estate, mandates that this Court grant certiorari. *See, e.g., Logan v. Zimmerman Brush Company, supra.*

A State's Highest Court Offends the Equal Protection Clause of the Fourteenth Amendment When It Treats One Litigant Differently Than It Has Treated Other Similarly Situated Litigants, and When the Distinction Bears No Rational Relationship to Any State Interest

In rendering its decision in this case, the Pennsylvania Supreme Court also violated the Equal Protection Clause of the Fourteenth Amendment. Petitioner's constitutional right to equal protection required the Pennsylvania Supreme Court to treat her as fairly and in the same manner as it treated all other appellate litigants. Instead, the Pennsylvania Supreme Court inexplicably chose this occasion to create two subcategories of appellate litigants: (1) this petitioner and (2) all other persons. This classification scheme is not rationally related to any legitimate gov-

15. (Cont'd.)
ment nor had it ever modified its rules to allow the filing of such an application. As is discussed *infra*, this gives rise to Petitioner's Fourteenth Amendment equal protection claim.

ernmental purpose. The Pennsylvania Supreme Court acted in blatant violation of Petitioners' equal protection rights. *See, Schweiker v. Wilson,* 450 U. S. 221 (1981). Moreover, after creating these two discrete groups of appellate litigants, the Pennsylvania Supreme Court then accorded each group radically disparate treatment: (1) petitioner was denied the procedural due process rights prescribed by Pennsylvania's established rules of appellate procedures while (2) all other persons are accorded this procedural due process. As this Court recently reiterated:

> We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of State authority.

Plyler v. Doe, — U. S. —, —, 102 S. Ct. 2382, 2392 (1982).

This Court has long recognized that equal protection mandates that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia,* 253 U. S. 412, 415 (1920). Generally, the Equal Protection Clause is invoked by a party who challenges a legislative enactment as creating separate classes of persons and affording benefits to one class while denying benefits to the other class. *See, e.g., Plyler v. Doe, supra; U. S. Railroad Retirement Board v. Fritz,* — U. S. —, 101 S. Ct. 453 (1980); *Reed v. Reed,* 404 U. S. 71 (1971). Here, Petitioner does not maintain that a state procedural rule is facially unconstitutional. To the contrary, Petitioner seeks enforcement of and compliance with a facially neutral state rule of procedure which the State court has unwarrantedly abrogated in this case alone. That judicially

insupportable abrogation deprived Petitioner of equal protection because it relegated her to a sub-class where she stands alone, and where she is disparately treated for no lawfully cognizable reason.

Until its decision in the case *sub judice*, the Pennsylvania Supreme Court had consistently applied the doctrine of "the law of the case" in refusing to review its own decisions, even if that Court subsequently questioned its original ruling. *See, e.g., Commonwealth v. Tick, Inc.*, 431 Pa. 420 (1968); *Kuchinic v. McCrory*, 422 Pa. 620 (1966); *Delaware River Port Authority v. Pennsylvania Public Utility Commission*, 408 Pa. 169 (1962). This finality of judgment rule assured Pennsylvania litigants that they could rely on final decisions of that Court in conducting their legal affairs. Similarly the doctrine of "the law of the case" secured finally determined property rights against endless legal challenges raising previously decided claims.

When the Supreme Court of Pennsylvania disregarded the final "law of this case," which was established by the April 30, 1980 judgment upholding the Will of the decedent, the Court abridged Petitioner's right to be treated as similarly circumstanced litigants had always been treated by the court.

This Court recently reiterated that "[a] state-created right can, in some circumstances, beget yet other rights to procedure essential to the realization of the parent right." *Connecticut Board of Pardons v. Dumschat*, — U. S. — , — , 101 S. Ct. 2460, 2463 (1981) (citing cases). Petitioner had a "state-created" and guaranteed right to the final judgment entered in 1980 by the Pennsylvania Supreme Court. Embraced within this parent right was the corresponding procedural notion that the state could not deprive Petitioner of her vested property interest absent full compliance with the dictates of the Due Process

and Equal Protection Clauses. Nonetheless, in one swift stroke of the pen, in one brief sentence, an anonymous sitting Justice of the Pennsylvania Supreme Court erased these constitutional principles and relegated fundamental constitutional precepts to mere whim.

Thus, the Pennsylvania Supreme Court twice treated Petitioner differently from all similarly situated litigants. The first instance occurred when that Court abjured the law of this case and disregarded its conclusive finality. The second instance came to fruition when that Court denied this Petitioner the same right to be notified and heard as all other litigants are afforded when an application for reargument is under judicial consideration. Petitioner asks this Court to restore those rights which were irrationally and unconstitutionally cast aside and taken from her.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of Pennsylvania so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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